

Hawaiian Gazette.

WEDNESDAY, MARCH 25 1886

**Supreme Court of the Hawaiian Islands
In Equity**

**G. N. WILSON, PLAINTIFF,
vs.
A. G. ELLIS,
Defendant.**

This is a bill to declare fraudulent and void a sale made by defendant to plaintiff of sixty shares of the capital stock of the Honolulu Ice & Cold Storage corporation under Hawaiian law—at \$75.00 per share, and also for an injunction to restrain defendant from taking out an execution upon a judgment for \$1,200 obtained by the defendant against the plaintiff at the last July term of this Court, for the purchase money of this stock.

The bill charges that the fraud was accom-

plished by misrepresentation and by the concealment of material facts. The misrepresentation is charged to be statements made by defendant that the stock was good, marketable stock and a first rate investment at the price offered, and that the President of the Ice Company, S. G. Whider, who was the principal owner of its stock, held it at par (\$100) and refused to sell for less.

The concealment is charged to be of the fact that the stock was unsaleable, and was by reason of an expected competition in the ice business, of greatly less value than par.

proved to the evidence, that on the morning of the sale of the stock, April 10, 1884, Ellis knew that the new ice company was about to be formed. This is clear from the evidence of Mr. Sass, the projector of the company, who says he told Ellis all about it just previous to

WAS Ellis under any legal obligation to

tion to disclose this information to Wilcox. By the authorities he was not. Chancellor Kent's statement of the law in this regard is as favorable to the plaintiff as any. He says: "When, however, the means of information relating to facts and circumstances affecting

relative to facts and circumstances affecting the value of the commodity, be equally accessible to both parties and neither of them does or says anything tending to impose upon the other, the disclosure of any superior knowledge which one party may have over the other

as to those facts and circumstances, is no necessary to the validity of the contract. There is no breach of any implied confidence that one party will profit by his superior knowledge, as to facts and circumstances open to the observation of both parties, or equally

within the reach of their ordinary diligence because neither party reposes in any such confidence, unless it be specially tendered or required. Each one, in ordinary cases, judge for himself, and relies confidently, and per

shape, presupposedly upon the soundness of his own knowledge, skill and diligence. The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and

The possibility of competition in the business of ice making is one of the chances to which all business ventures are subject. M

Sams had caused to be published in the *Daily Bulletin* of 31 March, an extended account of it, ending with the statement: "Mr. Sams leaves by the *Albatross* to purchase the necessary machinery."

Pomeroy says, (Sec. 904 2 Pomeroy Eq. Jur.) that a broader duty to disclose material facts rest upon the vendor than on the vendee. "In ordinary contracts of sale where no fiduciary relation exists, and where no confidence, express or implied, growing out of, or con-

ected with the very transaction itself, is reposed on the vendor and the parties are dealing with each other at arm's length, and the purchaser is presumed to have as many reasonable opportunities for ascertaining all the facts as any other person in his place would.

facts as any other person in the place would have had, then the general doctrine above stated applies; no duty to disclose material facts known to himself rests upon the vendor; his failure to disclose is not a fraudulent concealment."

There was no fiduciary relation existing between Ellis and Wilcox. Nor is there any evidence that Wilcox expressly reposed confidence in Ellis in this transaction. So far from this being the case, Wilcox says he was born by Ellis' importunity and that he made it

offer to get rid of him, not expecting that would be taken. The parties were at arm's length. Wilcox was not seeking investment and was, so to speak, surprised into the sale.

Mr. Justice Story (2 Story's Eq. Jur., Sec. 1001, note 1).

204) in speaking of undue concealment or *suppression* *tert*, "It is not every concealment, even of facts material to the interests of party which will entitle him to the interposition of a Court of Equity. The case must amount to the suppression of facts which

party, under the circumstances, is bound conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent." And in Section 205, "The question is not whether an advantage has been taken, which in point of morals is wrong.

But it is essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but, also, that there should be some obligation on the part

to make its discovery. Section 207. A true definition, then, of undue concealment which amounts to fraud in the sense of a Court of Equity, and for which it will grant relief is the non disclosure of those facts and circumstances which one party is under some

legal or equitable obligation to communicate to the other; and which the latter has a right not merely *in foro conscientie* but *juri et jure* to know."

vendor has actual knowledge from private sources of facts or events—which are called extrinsic circumstances—not known to the other party, which materially affect the price of the goods. Story says where the intelligent

is not equally accessible to both parties, equity will not relieve, if it is not a case of mutual confidence. *Id.* Sec. 149. See *Laidlaw v. Organ*, 2 Wheaton 178, and *Mathews vs. Blinn*, 22 Pick. 48.

On the ground of undue concealment, therefore, I think the bill fails.

that this was a mere matter of opinion and such is not relievable in equity, where as this case, the parties were dealing with each other upon equal terms.

Wilcox testified that Ellis after expatiating on the value of the stock said that Wilder considered it a first rate investment and would not sell at less than par. He spoke of him

being President (of the Co.) and holding m of the stock. He said also that he would have rinked the offer he made of \$70 per sh if he had known that Wilder's reason for fusing to sell at par was that he would

Mr. Wilder testified that he had frequently stated that any stocks he was holding that were good he should keep and if he knew a stock was not good he would not stick his fingers in it, and this applied to the stock in

Mr. Ellis in his answer denies that he wrote to Mr. Wilcox that Wilder held his stock put and refused to sell for less—but says that he answered Wilcox's enquiry as to whose shares were, that they were Foster's and W.

cor asked: "Are you not selling for Wilder and do you not think I could buy of Wilder less than \$85?" Ellis replied that he offered sell for Wilder but that Wilder was unwilling to sell for less than par.

He may have asked me if I had any for sale. I have never sold any or offered any for sale. It seems to me that the inference from

Wilder's testimony is not that he would sell for less than par because the stock was then worth at least par. He was unwilling to sell at all while the enterprise was in a condition of uncertainty. And I think Mr. E. used the language attributed to him by W.

Wilder says that if the opposition started, stock in the company, owing to the limit

of no value as an investment; but without opposition it would pay say 10 per cent., he had doubts as to the starting of the company, until Mr. Sams returned from California with his machinery, for he thought

Penney says (Sec. 876) a misrepresentation in order to constitute fraud must contain the following essential elements: (1) It is

a mere opinion. (2) Its purpose of inducing the other party to act—the general presumption being that a misrepresentation has such design. (3) Its untruth. (4) The knowledge or belief of the party making it. (5) The off

(6) Its materiality. And under (5) The party must be justified in relying upon the representation. Here the party is not justified relying upon the representation if he acts

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